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No. 76-1780

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMELIA O. BONSUKAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 554 F.2d 2.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1977. The petition for a writ of certiorari was filed on June 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 2350 and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner effectively waived the assistance of counsel at the hearing before the Immigration Judge.

2. Whether the court of appeals correctly declined to review petitioner's challenge to her deportation order

on the ground that petitioner had not exhausted her administrative remedies, as required by 8 U.S.C. 1105a(c).

3. Whether the Board of Immigration Appeals properly denied petitioner a suspension of her deportation.

STATEMENT

Petitioner, a native of the Philippines, entered the United States in 1968 as a nonimmigrant exchange visitor authorized to remain until June 30, 1970 (App. 9).[1] She did not depart on that date but sought a preference visa status, which proved unavailable. In September 1974, the Immigration and Naturalization Service notified petitioner that she would be permitted voluntary departure, in lieu of deportation, provided that she left by October 7, 1974 (App. 7). Petitioner did not depart and an Order to Show Cause and Notice of Hearing was issued in September 1975, advising her that a deportation hearing was scheduled for October 8, 1975 (App. 9).

Petitioner and her counsel appeared before the Immigration Judge on the scheduled date and successfully sought a continuance until October 30, 1975, to allow petitioner and counsel more time to confer. On October 30, 1975, petitioner appeared before the Immigration Judge without counsel, stating that she could not locate him (App. 14). The Immigration Judge informed petitioner of her right to counsel and offered to defer the hearing for another week to give petitioner an opportunity to locate counsel and secure his presence (App. 15). After conferring with a friend, petitioner stated that she wished to proceed with the hearing (*ibid.*).

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[1] "App." refers to the appendix to petitioner's brief in the court of appeals.

Thereafter, petitioner admitted that she was deportable for the reasons set out in the Order to Show Cause (App. 10, 16-18). She also testified that a private bill was pending before the Congress providing for her admission as a permanent resident alien (App. 8, 17; H.R. 7493, 94th Cong., 1st Sess. (1975)). The Immigration Judge found petitioner deportable, granted her until January 30, 1976 to depart voluntarily (App. 10-12),[2] and advised her that she could appeal to the Board of Immigration Appeals (App. 20). She stated that she would accept the decision and did not appeal to the Board (*ibid.*).

When petitioner did not depart as directed, a deportation notice was issued on February 17, 1976 (App. 21). On March 3, 1976, petitioner filed a motion with the Immigration Judge to reopen and reconsider the deportation order and requested a stay of deportation (App. 25-26). The judge denied the motion on the ground that voluntary departure was the only form of relief available to petitioner, that the motion presented nothing to alter that conclusion, and that suspension of deportation was unavailable to petitioner (App. 27-29).

Petitioner appealed the denial of the motion to reopen and to suspend deportation to the Board of Immigration Appeals, asserting that she was not an exchange visitor (App. 30). The Board dismissed the appeal, holding that petitioner was not entitled to suspension of deportation both as a matter of discretion and as a matter of law (App. 31-32). The court of appeals affirmed (Pet. App. 1).

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[2]The Immigration Judge granted petitioner 90 days rather than the usual 30 days within which to depart, in view of the pendency of petitioner's private bill (App. 19). Apparently, no action was taken on that bill.

ARGUMENT

Petitioner contends that she did not waive her right to counsel in deportation proceedings and that the court of appeals erroneously declined to review that issue on the ground that she failed to exhaust her administrative remedies. She also contends that she was wrongfully denied suspension of deportation under 8 U.S.C. 1254. None of these contentions merits review by this Court.

1. The record in this case demonstrates that petitioner knowingly and intelligently waived her right to counsel. Petitioner had originally appeared with counsel at the deportation hearing scheduled for October 8, 1975; when she appeared without counsel at the hearing on October 30, the Immigration Judge advised her of her right to counsel and provided full opportunity to defer the proceedings to secure his presence (App. 14). She declined this offer and chose instead to proceed with the hearing. That decision constituted a knowing and effective waiver of her right to be represented by counsel in those proceedings.

2. At the conclusion of the deportation hearing, the Immigration Judge announced an oral decision stating that, unless petitioner departed voluntarily, she was to be deported to the Philippines (App. 10-12). He then told petitioner that the decision was final in the absence of an appeal and asked her: "Do you wish to appeal or do you accept this as final?" (App. 20). Petitioner replied: "I accept it" (*ibid.*). No appeal was then filed within the 10-day period provided in 8 C.F.R. 242.21.

The court of appeals correctly held that it could not review the validity of this deportation order because petitioner had not exhausted her administrative remedies. The provisions of 8 U.S.C. 1105a(c) prohibit judicial review

of an order of deportation "if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations." This barrier to judicial review is jurisdictional. *Chung Chaw Wa* v. *Immigration and Naturalization Service*, 407 F.2d 854 (C.A. 1); *Arias-Alonso* v. *Immigration and Naturalization Service*, 391 F.2d 400 (C.A. 5); *Roumeliotis* v. *Immigration and Naturalization Service*, 354 F.2d 236 (C.A. 7), certiorari denied, 384 U.S. 907.[3]

3. Nor is there merit to petitioner's further claim that she was improperly denied suspension of deportation. Petitioner was admitted into the United States as a nonimmigrant exchange visitor pursuant to 8 U.S.C. 1101(a)(15)(J); as the court below observed (Pet. App. 1 at 3 n. 3), the language of 8 U.S.C. 1254(f) "explicitly bars the remedy of suspension of deportation to any exchange visitor."[4] Moreover, the Board of Immigration Appeals concluded that, were petitioner not barred from relief by statute, she

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[3]Petitioner's reliance on *Bregman* v. *Immigration and Naturalization Service*, 351 F.2d 401 (C.A. 9), is misplaced. In *Bregman*, the Ninth Circuit ruled that the filing of a motion to reopen within the six-month time limit for appealing a final order of deportation to the court of appeals tolled the period of judicial review. But cf. *Rosa* v. *Immigration and Naturalization Service*, 440 F.2d 100, 101 (C.A. 1); *Gena* v. *Immigration and Naturalization Service*, 424 F.2d 227, 231 (C.A. 5). Whatever may be the merits of this decision, however, it is not pertinent where the alien failed to exhaust her administrative remedies and merely made an unsuccessful motion to reopen a decision of the Immigration Judge after the period for filing administrative appeals had passed.

[4]A 1970 amendment to Section 1182(e), which deleted the previous requirement that no exchange visitor could apply for permanent residence or an immigrant visa unless the alien resided in a foreign country for at least two years after departure from the United States (8 U.S.C. (1964 ed.) 1182(e)), did not remove the statutory bar; it would, however, allow petitioner to seek an adjustment of status under 8 U.S.C. 1255(a), a remedy not previously available.

had nevertheless failed to demonstrate sufficient hardship to justify discretionary suspension of deportation under 8 U.S.C. 1254(a)(1). The court of appeals upheld that determination (Pet. App. 1 at 3) and further review is not warranted.[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5]In *Siang Ken Wang* v. *Immigration and Naturalization Service*, 413 F.2d 286 (C.A. 9), upon which petitioner relies (Pet. 7), the alien's eligibility for suspension of deportation was conceded. The court of appeals concluded that the Board, in denying discretionary relief under Section 1254, had relied upon an improper factor. In the present case, by contrast, the Board simply determined that petitioner had made an insufficient showing of hardship to justify discretionary relief.